Filed 2/18/05 Kindler v. Manheimer CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CHRISTOPHER E. KINDLER, Plaintiff and Appellant, v. SUSAN E. MANHEIMER, as Chief of Police, etc., Defendant and Respondent; SHAWN M. MASON, as City Attorney, etc., Real Party in Interest and Respondent.	A106652 (San Mateo County Super. Ct. No. CIV435866)

Plaintiff Christopher E. Kindler appeals from a judgment denying his petition for a writ of mandate, which sought an order directing respondent Susan E. Manheimer, the San Mateo Chief of Police, to notify the California Department of Justice (DOJ) that Kindler's name should be removed from the Child Abuse Central Index (index). We conclude the San Mateo Police Department (the department) properly followed the reporting procedures set forth in the Child Abuse and Neglect Reporting Act, Penal Code section 11164 et seq. (the Act),[1] and that substantial evidence supports the department's determination that the report that Kindler had engaged in child abuse was substantiated. Accordingly, we affirm.

[1] All statutory references are to the Penal Code unless otherwise noted. All references to section 11164 et seq. are to the Act as enacted prior to the amendments that were made in 2000 and 2001. (Stats. 2000, ch. 916, § 10; Stats. 2001, ch. 133, § 2.)

Factual and Procedural History

In November 2000, the department responded to Aragon High School on a report of an incident involving a 15-year-old boy and his former substitute teacher. The minor explained that Kindler had worked as a substitute teacher when the minor attended Borel Middle School, when he often saw Kindler on campus and at student activities. After his graduation, Kindler continued to contact him. In July 2000, when he was attending football camp, Kindler expressed an interest in watching him practice. Kindler told the minor he had been thinking about him all the time and wondered how he was doing. The minor thought Kindler's comments were odd and tried to avoid Kindler, but Kindler continued to attend his football practices and made conversation with him whenever he could.

At Aragon, the minor joined the high school football team and Kindler attended practices and began coming to his games. On October 20, 2000, Kindler bought a videotape of one of the minor's games and had it personalized with a photo of the minor on the tape case. About this time, the minor said he became more fearful of Kindler because he frequently saw him driving by his home when the minor's mother was out and he appeared at other unexpected times and places when the minor was spending time with his friends.

On November 27, 2000, the minor was home alone when Kindler knocked on the door and asked to enter. The minor let him in, but left the door open as they went to sit in the living room. The minor reported that Kindler then said, "You look pretty handsome in your uniform. You played well, and should have played more." Kindler told the minor he wanted to spend time with him and suggested they play cards, visit the library, or study for the minor's classes. Kindler also told the minor he loved him. Kindler brought up the subject of hair growth on the minor's legs and talked about his maturation into an adult. Then Kindler lifted the minor's pants leg and touched or almost touched his leg. After Kindler left, the minor reported the incident to his football coach who reported the incident to the department.

During the course of the department's investigation of the November 27 incident, officers talked to administrators at Borel Middle School who reported that Kindler had come under scrutiny because he routinely fostered unprofessional relationships with students. The administrators repeatedly and unsuccessfully tried to stop Kindler from fraternizing with students and directed him to stop taking students off campus to lunch. Kindler ignored these requests and began bringing the students' lunches back to the campus rather than taking the students out to lunch. Officers also interviewed parents of other Aragon football players, at least one of whom was so concerned by Kindler's presence at the games and practices that he notified the school. The football coach, who had also been concerned about Kindler's presence, asked Kindler to stay away from the practices and told his players to stay away from Kindler.

Finally, the department identified two other potential victims who had been students at the middle school when Kindler was a substitute teacher. One of these minors reported he rode in Kindler's car many times and went to lunch alone with him on several occasions. On one occasion, Kindler told him they should spend more time together. On another occasion, Kindler placed his hand on the minor's upper knee, patted it several times and moved his hand up the minor's thigh. The other minor told officers Kindler drove him home from school and tickled him on the ribs, thighs, and stomach. The minor thought the conduct was unusual and never accepted another ride from Kindler.

When its investigation was complete, the department delivered its reports to the district attorney's office. On September 18, 2001, Kindler was charged by information with willfully and unlawfully entering an inhabited dwelling with the intent to commit felony child molestation (§ 460, subd. (a)); willfully and unlawfully annoying or molesting a child under the age of 18 years after entering, without consent, an inhabited dwelling house (§ 647.6, subd. (b)); willfully and unlawfully committing a lewd and lascivious act upon a child 15 years old and at least 10 years younger than defendant

(§ 288, subd. (c)(1)); and willfully, maliciously and repeatedly following or harassing another person (§ 649.9, subd. (a)).[2]

As part of the district attorney's investigation, Deputy District Attorney Laura Torres interviewed the minor in the presence of a detective from the department. The interview was not recorded but in support of his writ petition, Kindler offered the declaration of his investigator, John Blackburn, who observed the interview from an adjacent room. According to Blackburn, during the interview the minor stated Kindler "was like a father figure/mentor to him" and that they never discussed "emotions or personal stuff" or anything of a "sexual nature." With respect to the November incident, Blackburn reports, "[T]he minor indicated that when petitioner came to the front door of his house, he opened the door and did allow [Kindler] to enter his home. He did not tell [Kindler] that he did not want him to come inside the residence. The minor told [Torres] that when [Kindler] came into the apartment, [Kindler] patted him on the rear shoulder area and told him that he loved him. Ms. Torres asked him if [Kindler] said this like a father would say to his son or was it in a sexual way; the minor told her that it was like a father to son." Finally, Blackburn reports that "[t]he minor told Ms. Torres that [Kindler] never touched his pants or his leg (skin) and Ms. Torres asked him why he told that information to [the police investigators]. The minor indicated to Ms. Torres that he had lied to the detectives about [Kindler] touching his leg or pant leg; he said he made this up in response to his friends teasing him about [Kindler] coming over to his house."

On April 2, 2002, the district attorney entered into a plea agreement under which the information was amended to add two additional counts charging Kindler with nonsexual battery upon a minor. Kindler agreed to plead guilty to these additional counts in exchange for three years probation and the dismissal of the remaining counts. Kindler entered his plea the following day, and the remaining charges were dismissed. The

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[2] Kindler's request for judicial notice of the record in *People v. Kindler*, San Mateo County, No. SC50120A, is granted.

department was notified of the outcome of the criminal proceedings and on July 31, 2002, the department reported the matter to the DOJ.

On November 24, 2003, Kindler filed his petition for a writ of mandate seeking to compel the department to cause his name to be removed from the index. After issuance of an alternative writ, the trial court issued a statement of decision denying the petition, and entered judgment against Kindler. Kindler filed a timely notice of appeal.

Discussion

The Act requires "childcare custodians" to report suspected child abuse or neglect to certain public agencies, including the local police department, within 36 hours of receiving information regarding an incident of suspected abuse. (§§ 11165.7, 11165.9, 11166.) "Child abuse" includes, among other things: "physical injury inflicted by other than accidental means upon a child by another person," and the "sexual abuse" of a child. (§ 11165.6.) Sexual abuse, as defined in section 11165.1, includes a lewd and lascivious act within the meaning of section 288, subdivision (c)(1) and child molestation within the meaning of section 647.6.

Once a report is received, the designated public agency must investigate and determine whether the alleged perpetrator should be reported to the DOJ for inclusion in the index. "The Act defines three levels of reports, unfounded, substantiated, and inconclusive. An '[u]nfounded report' is one 'determined by the investigator who conducted the investigation to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect . . . .' [Citation.] A '[s]ubstantiated report' is one the investigator determines, 'based upon some credible evidence, to constitute child abuse or neglect . . . .' [Citation.] An '[i]nconclusive report' is defined as one the investigator determines 'not to be unfounded, but in which the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect . . . has occurred.' [Citation.] [¶] An agency reviewing a report of alleged child abuse or neglect is required to forward to the DOJ a written report 'of known or suspected child abuse or severe neglect' after the agency 'has conducted an active investigation and determined that the report is not unfounded . . . .' [Citation.] . . .

[¶] The DOJ is required to 'maintain an index of all reports . . . .' [Citation.] But . . . the department merely acts as 'a repository' [citation], with the reporting agencies assuming 'responsib[ility] for the accuracy, completeness, and retention of the reports . . . .' [Citation.] . . . Reports may be removed from the index in two instances: When a reporting agency notifies the DOJ that 'a report . . . previously . . . filed [has] subsequently prove[n] to be unfounded' [citation], or where 'a person . . . listed in the [index] only as a victim of child abuse or neglect . . . [who] is 18 years of age or older . . . [files a written request to] have his or her name removed.' " (*Burt v. County of Orange* (2004) 120 Cal.App.4th 273, 280.)

Here, officials at Aragon High School were the childcare custodians who reported the suspected child abuse to the department. Thereafter, the department was charged with investigating and determining whether the report was unfounded, substantiated, or inconclusive. The department determined the report was substantiated and therefore reported Kindler to the DOJ. Kindler advances numerous reasons for which he contends the department improperly reported him to the DOJ. None has merit.

1. *The Act does not require the reported suspect to be a childcare custodian.*

Kindler contends he was no longer the minor's teacher at the time of the incident and thus was not a childcare custodian under the Act. This contention confuses the role of a childcare custodian, who must report the suspected abuse, with that of the suspected perpetrator of the abuse. School authorities, as childcare custodians, are required to report all suspected abuse, whether or not committed by another childcare custodian. (§ 11166.) Nothing in the Act limits to childcare custodians those who must be reported and listed in the index.

2. *The department was not barred by the doctrine of collateral estoppel from determining that the report of sexual abuse was substantiated.*

Kindler contends the dismissal of the criminal charges of sexual abuse precluded the department from concluding that the report with regard to the same conduct was substantiated. This claim of issue preclusion fails. Whether Kindler committed sexual abuse was not actually litigated or necessarily decided in the criminal proceedings

because the sexual abuse counts were dismissed pursuant to a plea bargain. (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1528 [dismissed allegations not actually litigated and "judgment based on a guilty plea is not entitled to collateral estoppel effect"]; *Zapata v. Department of Motor Vehicles* (1991) 2 Cal.App.4th 108, 112 ["issue must have been actually litigated in the former proceeding" for collateral estoppel to apply].)

Buttimer v. Alexis (1983) 146 Cal.App.3d 754, relied on by Kindler, is distinguishable. In *Buttimer*, the court held that the Department of Motor Vehicles was collaterally estopped from relitigating in an administrative proceeding whether defendant had been driving under the influence because the issue had necessarily been determined in the defendant's favor in a previously dismissed criminal action. (*Id.* at p. 758.) In that case, however, the court found that the issue had been actually litigated because evidence was presented and considered prior to granting the defendant's motion to suppress. (*Id.* p. 759.) There was no such hearing or judicial determination in this case.

3. *The department's report to the DOJ was not untimely*.

Kindler contends the department "is collaterally estopped from reporting the matter to the Department of Justice based upon the fact that the San Mateo Police Department's report was completed on December 2, 2000, and the San Mateo Police Department did not report the matter to the Department of Justice until July 31, 2002." While Kindler understandably questions the long delay in reporting him to the DOJ, he provides no explanation of why collateral estoppel applies to bar the filing of the report. Although childcare custodians are required to report suspected abuse within 36 hours, the Act does not provide any specific time limit within which the department was required to submit its report to the DOJ. Kindler articulates no legal theory which precludes filing the report because of the department's delay.

4. *Kindler's reliance on the lack of physical injury to the minor is misplaced.*

Kindler next contends he was not subject to being reported because "child abuse" under section 11165.6 requires the infliction of a physical injury and he did not physically injure the minor. However, section 11165.6 defines "child abuse" to include

not only "a physical injury which is inflicted by other than accidental means on a child by another person," but also, among other things, "sexual abuse as defined in Section 11165.1." Section 11165.1, subdivision (a), in turn defines sexual abuse to include conduct in violation of sections 288, subdivision (c)(1) and 647.6. Section 288 makes it a felony for any person to "willfully and lewdly commit[] any lewd or lascivious act" on the body of a child "with the intent of arousing . . . the lust, passions, or sexual desires of that person or the child."[3] A touching of a child violates this section "even if the touching is outwardly innocuous and inoffensive, if it is accompanied by the *intent* to arouse or gratify the sexual desires of either the perpetrator or the victim." (*People v. Lopez* (1998) 19 Cal.4th 282, 289.) Section 647.6, subdivision (a) "does not require a touching [citation] but does require (1) conduct a ' "normal person would unhesitatingly be irritated by" ' [citations] and (2) conduct ' "motivated by an unnatural or abnormal sexual interest" ' in the victim [citations]."[4] (*People v. Lopez*, *supra*, at p. 289.) The absence of physical injury therefore is not dispositive.

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[3] Section 288 provides in relevant part: "(a) Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years. [¶] . . . [¶] (c)(1) Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year."

[4] Section 647.6 provides in relevant part: "(a) Every person who annoys or molests any child under the age of 18 shall be punished by a fine not exceeding one thousand dollars ($1,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment. [¶] (b) Every person who violates this section after having entered, without consent, an inhabited dwelling house . . . shall be punished by imprisonment in the state prison, or in a county jail not exceeding one year."

5. *The department's report to the DOJ was supported by credible evidence.*

Under former section 11165.12, a " 'substantiated report' means a report which is determined by a child protective agency investigator, based upon some credible evidence, to constitute child abuse or neglect, as defined in Section 11165.6." Here, the statements given to investigators by the victim, school officials, parents of other students on the football team, and two additional potential victims provide credible evidence that Kindler engaged in conduct prohibited by sections 288 and 647.6.

The dismissal of the more serious criminal charges does not necessarily negate the credibility of this evidence. The criminal charges were dismissed pursuant to a plea bargain, the motivation for which could have been any number of things, including the higher standard of proof that applies to a criminal prosecution or a desire not to require the victim to testify. Likewise, Torres's interview of the minor, as described by Blackburn, does not necessarily render the report unfounded. While evidence of the minor's statements to Torres created factual disputes, the existence of contrary evidence does not conclusively establish the falsity of the other evidence. It was within the department's discretion under the Act to evaluate the evidence and determine whether the report was not unfounded. (*Burt v. County of Orange*, *supra*, 120 Cal.App.4th at p. 281.) The substantial evidence cited above amply supports the department's decision to report the matter to the DOJ. Moreover, while the department determined the report was substantiated, it would have been required to submit the report even if the results of its investigation were considered inconclusive. (§ 11169, subd. (a) [investigating child protection agency must forward to DOJ a report on every case of suspected child abuse "which is not determined to be unfounded"].)

Finally, Kindler's reliance on exculpatory statements in a letter written by Torres more than one month after the department filed its report with the DOJ is misplaced. In her letter to the sheriff's department, Torres expressed her concerns regarding Kindler's rejection from the sheriff's work program. The letter reads, "The police report upon which the presentence probation report is based has some very strong conclusions that were not ultimately supported by provable facts. [¶] . . . This case . . . did not become the

extreme case that the original officers believed that it would. While Mr. Kindler should not have tried to have a relationship beyond mere teacher/student with the victim—there was no sexual touching." Because this letter was written after the report was filed with the DOJ, it is not relevant to whether credible evidence supported the department's report when it was submitted. While the letter may have some bearing on whether the department should have recalled the report when asked to do so by Kindler in February 2003, even as to that question it is not conclusive. In a subsequent letter written to Kindler in May 2003, Torres explained, "I believe, as I have always believed, that your intention with these young boys was sexual and inappropriate." "I also believe that putting the children on the stand at criminal jury trial would have been detrimental and harmful for them." When all of the evidence is considered, the department had substantial evidence upon which to base its report, and no evidence uncovered subsequent to the filing of the report was so compelling as to require the department to request the removal of Kindler's name from the index.[5]

Accordingly, the trial court properly denied Kindler's petition for a writ of mandate.

Disposition

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Corrigan, J.

[5] Kindler also asserts that application of the provisions of section 11165.6 as amended in 2001 would violate the prohibition against ex post facto laws. However, both the trial court and this court have applied the Act as it read at the time of the suspected abuse.